



FEMA

November 25, 2009

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OFFICE OF  
CHIEF COUNSEL  
OF  
CONTRACT APPEALS  
BS

DOCKET NUMBER: CBCA-1768-FEMA

Dear Sir or Madam:

Please find attached the Response of Federal Emergency Management Agency (FEMA) to the arbitration request submitted by State of Louisiana's Facility Planning and Control and filed as CBCA-1768-FEMA. Submitted with the Response is a binder(s) of exhibits.

**Please add the following Office of Chief Counsel contacts for all notices and correspondence to FEMA related to the arbitration hearing: Linda M. Davis, Associate Chief Counsel – Program Law Division, 202-646-3327 or [lindam.davis@dhs.gov](mailto:lindam.davis@dhs.gov); and Kim A. Hazel, Senior Counsel – Program Law Division, 202-646-4501 or [kim.hazel@dhs.gov](mailto:kim.hazel@dhs.gov).**

Very truly yours,

Chad T. Clifford  
General Attorney  
Office of Chief Counsel  
DHS/Federal Emergency Management Agency  
500 C St., S.W.  
Washington, D.C. 20472

BY NEXT DAY DELIVERY

cc:

To the Applicant:

Mr. Jerry Jones  
Assistant Commissioner  
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1201 North 3<sup>rd</sup> Street, Suite 7-160  
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To the State:

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Governor's Authorized Representative  
Governor's Office of Homeland Security and Emergency Preparedness  
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To the Region:

Mr. Gary Jones  
Acting Regional Administrator  
800 N. Loop 288  
Denton, TX 76209

**FACILITY PLANNING AND CONTROL, STATE OF LOUISIANA  
CITY PARK ROAD AND WALKWAY REPAIRS, PW# 17708  
FEMA-1603-DR-LA  
DOCKET # CBCA 1768-FEMA**

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**RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO  
ARBITRATION REQUEST OF FACILITY PLANNING AND CONTROL, STATE OF  
LOUISIANA**

On October 26, 2009, the Federal Emergency Management Agency ("FEMA") received the request of the State of Louisiana's Facility Planning and Control ("Applicant") to arbitrate the Applicant's request for \$2,200,000 for repairing streets and walkways in New Orleans City Park ("Park"). See Exhibit 1. This constitutes FEMA's response to the arbitration request by the Applicant.

**JURISDICTION**

The Applicant invokes jurisdiction pursuant to The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164-166 (2009), which establishes the option for arbitration under the Public Assistance ("PA") program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX and DR-1607-LA. See 44 C.F.R. § 206.209.

The Applicant meets regulatory guidelines for filing an arbitration request as outlined in 44 C.F.R. §206.209 as follows:

- Project Worksheet (PW) 17708 represents eligible repair cost for disaster-related damages to roads, sidewalks and curbs in City Park.
- Arbitration request for \$2,200,000 exceeds the \$500,000 project threshold.
- Applicant filed first appeal on May 16, 2008.

- Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) submitted first appeal to FEMA on July 17, 2008.
- FEMA responded to the Applicant's first appeal with a decision on August 11, 2008.
- GOHSEP notified Applicant of FEMA's first appeal decision on August 21, 2008.
- Applicant timely filed its second appeal on October 1, 2008.
- GOHSEP submitted Applicant's second appeal to FEMA on October 27, 2008.
- Applicant withdrew its pending second appeal in letter dated October 13, 2009.
- Applicant filed its Request for Arbitration dated October 23, 2009, and provided supporting documentation consisting of ten exhibits.

## **SUMMARY OF FEMA'S POSITION**

The Applicant requests \$2,200,000 for repairs of roadway and sidewalk damage in the Park. The Applicant's request is based on scopes of work and estimated cost for damage at 79 sites within the Park. FEMA previously determined that two of these sites were duplicated in the applicant's list of damage sites; therefore, there are actually only 77 sites. FEMA inspected 60 of the 77 sites; and the remaining 17 sites are identified to FEMA for the first time in this arbitration. These 17 sites are not eligible for arbitration because the Applicant did not request assistance to repair these sites during the first appeal. Of the 60 sites inspected, FEMA decided on first appeal that only two (2) sites indicated disaster-related damage. Therefore, 58 sites are within the subject matter jurisdiction of this Panel. 44 C.F.R. §206.209(b).

FEMA agrees with the Applicant that damage to these 58 sites is disaster-related. FEMA also concurs with the Applicant's recommended repair scope of work for each of these 58 sites. FEMA used the Cost Estimating Format and estimated the cost to repair damage at the 58 sites to be \$1,911,855. FEMA will approve this amount for these repair projects.

FEMA further maintains that the Applicant did not request assistance to repair the remaining 17 sites during the first appeal. Because there was no prior FEMA determination as to these 17 sites, they are not eligible for arbitration pursuant to 44 C.F.R. §206.209(b). FEMA respectfully requests that the Panel deny this part of the Applicant's claim.

## BACKGROUND

### **The Stafford Act**

FEMA, a component agency of the United States Department of Homeland Security, is responsible for, among other duties, administering and coordinating the Federal governmental response to Presidentially-declared disasters pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act").<sup>1</sup> 42 U.S.C. §§ 5121 *et seq.* The Stafford Act is triggered when, at the request of the governor of a state, the President declares an affected area to be a "major disaster." See 42 U.S.C. § 5170; 44 C.F.R. §§ 206.36; 206.38. When a major disaster is declared, the President determines the types of discretionary assistance that may be made available in the area he has determined is encompassed by the incident – the "declared area." 42 U.S.C. § 5170a.

The State of Louisiana is the grantee for all FEMA PA delivered in the State. See 44 CFR § 206.201(e). Facility Planning and Control is a subgrantee of the State of Louisiana. See 44 CFR § 206.201(l).

### **The Declaration**

On August 29, 2005, the President issued a major disaster declaration for the State of Louisiana as a result of Hurricane Katrina pursuant to his authority under the Stafford Act. See 42 U.S.C. § 5170. This declaration under the Stafford Act authorized all categories of Public Assistance, including emergency protective measures and restoration of eligible facilities. See Exhibit 2. The State of Louisiana is the grantee for all FEMA Public Assistance delivered in the State. See

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<sup>1</sup> The Stafford Act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. 42 U.S.C. § 5164.

44 C.F.R. § 206.201(e). Facility, Planning and Control, State of Louisiana, is a subgrantee, also called here the “Applicant,” of the State. See 44 C.F.R. § 206.201(l).

The President’s declaration enabled State Agencies, including Facility, Planning and Control, to apply for FEMA Public Assistance reimbursement for eligible emergency work and permanent repair, restoration, and replacement of eligible facilities. Emergency work includes measures, such as debris removal, that are necessary to eliminate immediate threats to life and property. See 42 U.S.C. § 5170b; 44 C.F.R. § 206.225. Restoration of eligible facilities includes the repair of a facility to its function immediately prior to the major disaster. An applicant may also apply for funding to replace or relocate a facility, or for an alternate or improved project. See 42 U.S.C. § 5172; 44 C.F.R. § 206.226.

The Stafford Act states that FEMA “may make contributions” for the repair, restoration, and replacement of damaged facilities. See 42 U.S.C. § 5172. Public Assistance (“PA”) allows FEMA, in its discretion, to provide disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the applicant, facility, and work meet eligibility requirements. See 44 C.F.R. §§ 206.200-.206.

PA funding may be provided in the form of grants for the state or local government’s own recovery efforts, or FEMA may fund direct federal assistance, through which a federal agency performs the recovery work. See 44 C.F.R. § 206.203; and 44 C.F.R. § 206.208, respectively. FEMA may also fund eligible private nonprofit facilities, such as educational facilities or schools, through a subgrantee. See 44 C.F.R. § 206.223(b).

To receive PA, the applicant must own an eligible facility and meet the work eligibility requirements set forth in FEMA regulations. Specifically, the item of work must be required as a result of the major disaster; the facility must be located within the disaster-declared area; and the facility must be the legal responsibility of the eligible applicant. 42 U.S.C. § 5122; 44 C.F.R. §§ 206.221-223; 206.226(c)(1). Under the PA program, a federal inspection team accompanied by a local representative surveys the damage and estimates the scope and cost of necessary repairs. See 44 CFR § 206.202(d). The inspectors record the information they gather on Project Worksheets (“PWs”). Id. PWs document damage caused by the disaster and list, among other information, the scope and “quantitative estimate for the eligible work.” Id.

After completion of the PWs, FEMA reviews the PW in order to make determinations of whether to approve funding for eligible work. Id. Thereafter, FEMA may make Federal disaster assistance funds available (*i.e.*, “obligate”) based on the final PW. See 44 C.F.R. § 206.202(e). A PW is not a contract between FEMA and the State and/or subgrantee to pay Federal disaster assistance and does not create any right to receive any such Federal funds. See 44 C.F.R. § 206.202(d). A PW only provides estimates, based upon the engineering analysis and on-site investigation of the anticipated cost of a project. See 44 C.F.R. § 206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635 (3rd Cir. 1998) (providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States).

## **Appeals and Arbitration**

The Stafford Act authorizes appeals of PA eligibility decisions. See 42 U.S.C. § 5189a. There are two levels of appeal - the first to the Regional Administrator, and the second to the Assistant Administrator for the Disaster Assistance Directorate. See 44 C.F.R. § 206.206(b). The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 601, 123 Stat. 115, 164-166 (2009) established a new option, arbitration, under the PA program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603, DR-1604, DR-1605, DR-1606, and DR-1607. See 44 C.F.R. § 206.209. A decision of a majority of this Panel will constitute the final decision, binding on all parties, and is not subject to judicial review, except as permitted by 9 U.S.C. § 10. See 44 C.F.R. § 206.209(k)(3).

## **Facility Planning and Control Project – New Orleans City Park Roads and Sidewalks**

The Park is owned by the State of Louisiana, but it is maintained by the Applicant. The Park is low-lying, flat, and largely below sea-level. See Exhibit 3 at 3. Flooding from Hurricane Katrina inundated the Park leaving four to six feet of standing water for several weeks. See Exhibit 4. Soon after floodwaters subsided, construction contractors and debris haulers used portions of the Park to stage large vehicles and heavy equipment. Id. Equipment staging and debris removal operations damaged roadways and walkways in the Park.<sup>2</sup> See Exhibit 3 at 3.

Between February 22, 2008, and February 28, 2008, a FEMA/GOHSEP team of engineers and technical specialists assessed damage to the Park's roadways, walkways, and curbs. Id. The Applicant chose not to accompany the assessment team during these site visits. Id. Instead, the

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<sup>2</sup> FEMA assumes that the road and walkway damage from heavy equipment resulted from emergency debris removal contractors working for the U.S. Army Corps of Engineers and funded by FEMA through Direct Federal Assistance. See Exhibit 4 at 1; see also 42 U.S.C. § 5173 and 44 C.F.R. § 206.208.

Applicant provided engineering plans with the location of damage and proposed repair scope of work. Id. The FEMA/GOHSEP team used these engineering plans to assess and validate the claimed damage, determine the cause of damage, and evaluate the eligible repair scope of work. Id. The assessment team found that much of the damage that the Applicant reported was not disaster-related and many of the proposed improvements were not eligible for PA funding assistance. Id.

The Applicant did not agree with the assessment team's findings. As a result, FEMA agreed to re-assess damage at the Park with the Applicant and GOHSEP prior to preparing a PW. Id. Follow-up site inspections occurred between March 20, 2008, and March 27, 2008. The Applicant's engineer and GOHSEP representatives participated in the follow up assessment.

Although FEMA determined that some of the claimed damage was clearly disaster-related, the assessment team attributed much of the damage to pre-disaster conditions and noted:

[T]he entire area has been subsiding for many years, causing differential settlement of structures and roads. Observed ineligible distresses include: previously-failed concrete sections; distresses with evidence of prior patches and repairs; distresses that pre-date the event; cosmetic distress that does not affect function; distress attributable to deferred maintenance; thermal cracking; normal deterioration due to age; vertical displacement due to general soil subsidence; damage attributable to frequent and currently-observed flooding and soil saturation. Id.

FEMA prepared PW 17708 to document disaster-related damage. Id. The eligible repair scope of work includes repairs to restore roadways, sidewalks, curbs and associated roadway features that were determined to be damaged by heavy equipment associated with debris operations. Id. The PW also documents Applicant-claimed damage that FEMA technical specialists determined

was pre-existing or the result of deferred maintenance. Id. FEMA estimated the value of eligible repairs to be \$181,805. The estimated cost of ineligible repairs noted in the PW is \$2,396,574.

FEMA provided a copy of the draft PW 17708 to the Applicant in April 2008. See Exhibit 4 at 3. The Applicant maintained its position that the scope of work and estimated cost of repairs were inadequate. Id. On May 7, 2008, FEMA obligated \$181,805 for the eligible scope of work identified in PW 17708. See Exhibit 3 at 3.

## **PROCEDURAL HISTORY**

### **First Appeal**

The Applicant appealed FEMA's determination for PW 17708 in a letter dated May 16, 2008. See Exhibit 5. The Applicant claimed that the cost to repair disaster-related damage is \$2,396,574. Id. Specifically, the first appeal references an opinion of the Applicant's consultant that i) FEMA erred in its assessment of disaster-related damage and, ii) that the disaster either caused the claimed damage or accelerated deterioration of the roads. See Exhibit 6.

In its first-level appeal decision, FEMA denied the Applicant's request for \$2,396,574 because the Applicant's appeal did not present any compelling information to support its claim that the disaster caused damage to the ineligible sites noted in PW 17708. See Exhibit 7. The Applicant's only support for its appeal was a consultant's opinion that the disaster damaged the roads. FEMA PA funding is limited to the cost to repair disaster-related damage. See 42 U.S.C. 5172 and 44 C.F.R. § 206.223(a). FEMA's PW 17708 documents disaster-related damage

identified after two exhaustive site visits. The Applicant did not provide any information that would support a finding that additional funding is eligible under the PA program.

### **Second Appeal**

On October 1, 2008, the Applicant filed a second-level appeal with FEMA, reiterating the same arguments contained in the first appeal. See Exhibit 8. The Applicant supported its position with another letter from the Applicant's consultant. See Exhibit 9. The consultant re-iterated his agreement with FEMA that many of the damaged roads had cracks and patches prior to Hurricane Katrina, but affirmed his earlier opinion that heavy traffic from debris removal operations over roadways weakened by flooding accelerated deterioration of the roads. The consultant opined that the disaster-related damage extends to all ineligible sites identified in PW 17708. The Applicant opted for arbitration and withdrew its pending second appeal pursuant to 44 C.F.R. § 206.209(e)(2).

### **Request for Arbitration**

The Applicant now files this request for arbitration seeking \$2,200,000. The Applicant argues in its request for arbitration that repairs are required because Hurricane Katrina caused breached levees in the New Orleans area, which resulted in brackish flood waters that inundated the City and saturated the roads and pavement areas within City Park for a period of several weeks. Because this area was used as a staging area for contractors involved in debris removal operations, heavy traffic and equipment caused additional damage to the previously saturated roads.

### Submission by the Grantee In Support of the Applicant

Per 44 C.F.R. § 206.209(e)(3), the Grantee timely forwarded to FEMA its written recommendation in support of the Applicant's request for arbitration. See Exhibit 10. No new additional issues were presented by the Grantee for FEMA consideration. Id.

### STANDARD OF REVIEW

While the ARRA provides for a limited waiver of immunity, it is silent as to the standard of review to be used in the arbitrations. However, the text of the ARRA clearly **contemplates an “arbitrary and capricious” -- and not a *de novo* -- standard of review**. First, the provision “the President shall establish an arbitration panel *under* the Federal Emergency Management Agency public assistance program,” (emphasis added) illustrates two clear concepts: (1) the Executive Branch is responsible for establishing the arbitration panel and defining its authority; and (2) the authority is “under” the FEMA PA program. It does not follow from that phrase that Congress intended a *de novo* review.

Second, the express purpose of the arbitration panel is “to expedite the recovery efforts from Hurricanes Katrina and Rita within the Gulf Coast Region.” Again, the plain text does not contemplate a *de novo* review that will duplicate previous time-intensive efforts to determine the amount of hurricane damage to facilities that is eligible for a grant under FEMA's PA program.

Third, the ARRA grants the arbitration panel “*sufficient authority* regarding the award or denial of disputed public assistance applications for covered hurricane damage under section 403, 406, or 407 of [the Stafford Act].” (emphasis added). The phrase “sufficient authority” indicates that

this Panel's authority is not absolute. Congress could not have intended the arbitration panel to have review authority that exceeds that of any Federal court. Indeed, this was settled by the Supreme Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985), where the Court noted that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."<sup>3</sup> By implementing the appropriate "arbitrary and capricious" standard, the arbitration panel has sufficient review authority.

Finally, the ARRA tasked the arbitration panel to make determinations regarding the "award or denial" of the PA application for "covered hurricane damage." Again, the ARRA provides for review of the prior administrative proceedings – the "award or denial" – not for an independent evaluation. The plain meaning of the phrase "covered hurricane damage" is that damage for which FEMA reimbursement is authorized by the Stafford Act. The ARRA plainly does not expand FEMA's authority under sections 403, 406 and 407 to provide Federal funding for hurricane damages and an arbitration panel must also necessarily be guided by, and limited to, the scope of sections 403, 406 and 407.

The arbitration panel must also consider "general principles respecting the proper allocation of judicial authority to review agency orders" when making its decision regarding the standard of review. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985). It is well-settled that

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<sup>3</sup> An arbitration under the ARRA is a unique circumstance resulting from special legislation specific to a particular set of entities that mandates FEMA, as the entity charged with implementing the Stafford Act, participate. It is therefore akin to an arbitration where one party is required to pursue a statutory claim. See, e.g., Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468-69, 1476 (D.C. Cir. 1997) (comparing arbitration under a collective bargaining agreement where nearly unlimited deference is paid with an arbitration of a statutory claim where such deference is "not appropriate").

review of Agency action, where Congress has not designated a standard of review, defaults to the arbitrary and capricious standard articulated in the Administrative Procedure Act (APA), 5 U.S.C. § 706:

In cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, [the Supreme Court] has held that consideration must be confined to the administrative record and that no de novo proceeding may be held.

United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (citing Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930); Nat'l Broad. Co. v. United States, 319 U.S. 190, 227(1943)). Accordingly, courts consistently hold that, in the absence of a statutorily-defined type of review, the reviewing body must seek guidance in the APA and only “hold unlawful or set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” ” GTE South, Inc. v. Morrison, 1997 U.S. Dist. LEXIS 23871 (E.D. VA) (citing 5 U.S.C. § 706(2)(A)); see Clark v. Alexander, 85 F.3d 146, 151-52 (4th Cir. 1996); Guaranty Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 794 F.2d 1339, 1342 (8th Cir. 1986) (proper to look to the APA and apply the arbitrary and capricious standard where statute did not define the type of review); see also Cabinet Mountains Wilderness v. Peterson, 222 U.S. App. D.C. 228, 685 F.2d 678 (D.C. Cir. 1982); Am. Canoe Ass'n v. United States EPA, 46 F. Supp. 2d 473, 476 (E.D. Va. 1999).

The APA standard for review of FEMA's public assistance decisions has been explained by the 9<sup>th</sup> Circuit when reviewing a decision by FEMA to deobligate certain costs from a PA grant:

Under the APA, we may set aside agency action only if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The standard is a narrow one, and the reviewing court may not substitute its judgment for that of the

agency. However, the agency must articulate a rational connection between the facts found and the conclusions made. Also, we must give substantial deference to an agency's interpretation of its own regulations.

Pub. Util. Dist. No. 1 of Snohomish County, Washington v. Fed. Emergency Mgmt. Agency, 371 F.3d 701, 706 (9<sup>th</sup> Cir. 2004) (internal citations omitted). See also Graham v. Federal Emergency Management Agency, 149 F.3d 997, 1007 (9<sup>th</sup> Cir. 1998) (applying APA and arbitrary and capricious standard where decision is not discretionary).

## **DISCUSSION AND ANALYSIS**

A major disaster is by definition an event for which Federal assistance is necessary “to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.” 42 U.S.C. § 5122(2). The “Repair, Restoration, and Replacement of Damaged Facilities” authorized by the Stafford Act are for the cost of repairing, restoring, reconstructing, or replacing a public facility damaged by a major disaster on the basis of the design of such facility as it existed immediately prior to the disaster. To be eligible for financial assistance, an item of work must be required as the result of the major disaster event. See 44 C.F.R. § 206.223(a)(1). The Applicant must identify and report damage to FEMA within a specified time period. See 44 C.F.R. § 206.202(d)(1)(ii). FEMA is responsible to determine eligible cost. 42 U.S.C. § 5172(e)(1).

### **Repair of Damage at 58 Sites Is Eligible for PA Funding**

On November 12, 2009, a FEMA geotechnical specialist reviewed soils and geologic data for the City Park area of New Orleans. See Exhibit 11. The specialist notes that historical soils conditions do not support FEMA's initial conclusion that the Park has a history of flooding or

that subsidence would have adversely impacted local pavement prior to the disaster. Id. FEMA's geotechnical specialist also found that the Park's soils are highly susceptible to shrink/swell conditions during and after a flooding event. Id. Although the flooding is not likely to have damaged the pavements directly, shrink/swell conditions in the weeks after Hurricane Katrina could have rendered pavements in the park vulnerable to extensive damage by heavy equipment operations. Id.

FEMA initially determined in PW 17708 that 58 of the 77 damage locations identified in the Applicant's Request for Arbitration were not disaster-related. See Exhibits 12 and 13. Upon review of this initial determination, and with the benefit of a geotechnical study, FEMA now concludes that damage reported at these 58 locations resulted from the standing floodwater and heavy equipment used on the roads during post-disaster debris operations. The repair of damage to eligible facilities that results from the performance of emergency work is eligible for Public Assistance funding. This has been a practice of the Public Assistance program since 2002. Further, FEMA has reviewed the Applicant's scope of work related to these 58 damage sites and concurs that the identified repairs are reasonable and necessary to restore the damaged roadway and sidewalk facilities.

FEMA also concurs with the Applicant's claim of disaster-related damage and eligible scope of work related to two damage locations (Stations 29+00 and 117+10). See Exhibit 12 at 1 and Exhibit 14 at 2, 5. PW 17708 identifies the damage reported at these locations as disaster-related and, accordingly, obligated funding for eligible scope of work. See Exhibit 14 at 2, 5. Although the description of the scope of work differs, the quantities and materials are identical. The

Applicant's request as it relates to these sites is unclear. If the Applicant's only objection is to the description of the scope of work, FEMA does not object to the Applicant's description.

**Repair of Damage at 17 Sites Identified in Applicant's Request  
Is Not Eligible for Arbitration**

The Applicant's Request for Arbitration includes 17 new damage sites within the Park that the Applicant had not previously identified as disaster-related damage. FEMA regulations provide that "An applicant or subgrantee ... may request arbitration of a determination made by FEMA on an application for Public Assistance, provided ... (2) the applicant had a first or second level appeal pending with FEMA pursuant to 206.206 on or after February 17, 2009." 44 C.F.R. § 206.209(b). The Applicant did not previously request assistance from FEMA for the 17 new damage sites, nor were these sites included in the Applicant's first or second level appeals. These sites may not be evaluated for eligibility or funding for the first time in this arbitration process. Therefore, FEMA respectfully requests that the Panel enforce the jurisdiction provisions of 44 C.F.R. § 206.209(b) and exclude these 17 sites from its consideration in this arbitration.

**The Reasonable Cost Estimate for Repairs to 58 Damage Sites is \$1,911,855.**

The Applicant did not submit a separate cost estimate for each of the 77 sites for which it requests review and favorable decision by this Panel. Therefore, FEMA applied the CEF to the scope of work for each of the 58 eligible sites. See Exhibits 15 and 16. FEMA's estimated cost to repair the 58 sites is \$1,911,855.

## **CONCLUSION AND RECOMMENDATION**

FEMA has determined that 58 of the 77 sites are eligible for FEMA funding. The approved amount is \$1,911,855. FEMA previously approved funding for two of the requested sites. Funding to repair the remaining 17 sites is not eligible for consideration in this arbitration because the sites had not previously been the subject of a FEMA eligibility determination or appeal decision. FEMA's determination as to the eligible scope of work and eligible costs in PW 17708 has a reasonable basis and is entitled to deference. FEMA respectfully requests that the Panel concur with FEMA's determination that \$1,911,855 is a reasonable estimate of cost to repair the 58 eligible road sites.

Respectfully submitted on this 25th day of November 2009 by,

A handwritten signature in black ink, appearing to read "Chad T. Clifford", written over a horizontal line.

Chad T. Clifford  
General Attorney  
Office of Chief Counsel  
DHS/Federal Emergency Management Agency  
500 C St., S.W.  
Washington, D.C. 20472

Attachments

Cc Jerry W. Jones  
Assistant Commissioner  
FP&C

Paul W. Rainwater  
Governor's Authorized Representative  
GOSEPH

Gary Jones  
Acting Administrator  
Federal Emergency Management Agency Region VI

## **LIST OF EXHIBITS**

- Exhibit 1 - Applicant's Request for Arbitration dated October 23, 2009, received October 26, 2009
- Exhibit 2 - Major Disaster Declaration FEMA 1603-DR-Louisiana
- Exhibit 3 - Project Worksheet 17008
- Exhibit 4 - Applicant's letter dated October 23, 2009
- Exhibit 5 - Applicant's first appeal dated May 16, 2008
- Exhibit 6 - Dupré letter dated May 5, 2008
- Exhibit 7 - First Appeal Decision dated August 11, 2008
- Exhibit 8 - Second appeal from Applicant dated October 1, 2008
- Exhibit 9 - Dupré letter dated October 1, 2008
- Exhibit 10 - GOSEPH Arbitration recommendation dated November 9, 2009
- Exhibit 11 - Geotechnical Report
- Exhibit 12 - Site Comparison
- Exhibit 13 - Ineligible Site Listing, Attachment 3 to PW 17008
- Exhibit 14 - Eligible Sites, Attachment 2 to PW 17008
- Exhibit 15 - CEF Instructional Guide
- Exhibit 16 - Cost Estimate Assessment